

This is the final rule for when Fibromyalgia was approved as a new illness. If you go over it you will find something that may help in getting your secondary illness rated. Many of the RO's will not rate the IBS, Headaches and depression as secondary like they should.

Normal 0 false false false EN-US X-NONE X-NONE

*REGULATORY AMENDMENT*

4-99-2

Regulation affected: 38 CFR 4.71a

Effective Date of Regulation: June 17, 1999

Date Secretary approved regulation: March 24, 1999

Federal Register Citation: 64 FR 32410 (June 17, 1999)

In the Federal Register of May 7, 1996 (61 FR 20438), we published an interim final rule adding a new diagnostic code, 5025, and evaluation criteria for fibromyalgia to § 4.71a of 38 CFR part 4, the rating schedule. This final rule responds to comments received in response to the interim final rule and adopts the interim final rule without change. The Federal Register document follows.

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 4

RIN 2900-AH05

Schedule for Rating Disabilities; Fibromyalgia

AGENCY: Department of Veterans Affairs

ACTION: Final rule

SUMMARY: This document adopts as a final rule without change an interim final rule adding a diagnostic code and evaluation criteria for fibromyalgia to the Department of Veterans Affairs' (VA's) Schedule for Rating Disabilities. The intended effect of this rule is to insure that veterans diagnosed with this condition meet uniform criteria and receive consistent evaluations.

DATES: Effective Date: This final rule is effective June 17, 1999. The interim rule adopted as final by this document was effective May 7, 1996.

FOR FURTHER INFORMATION CONTACT: Caroll McBrine, M.D., Consultant, Policy and **Regulations**

Staff (211B), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 273-7230.

SUPPLEMENTARY INFORMATION: On May 7, 1996, VA published in the Federal Register an interim final rule with request for comments (61 FR 20438). The rule added a diagnostic code, 5025, and evaluation criteria for fibromyalgia to the section of the VA Schedule for Rating Disabilities (38 CFR part 4) that addresses the musculoskeletal system (38 CFR 4.71a). A 60-day comment period ended July 8, 1996, and we received three comments, one from two physicians in the Department of Medicine at The Oregon Health Sciences University, and two from VA employees.

The evaluation criteria for fibromyalgia under diagnostic code 5025 have one requisite that applies to all levels: "[w]ith widespread musculoskeletal pain and tender points, with or without associated fatigue, sleep disturbance, stiffness, paresthesias, headache, irritable bowel symptoms, depression, anxiety, or Raynaud's-like symptoms." The 40-, 20-, and 10-percent evaluation levels are additionally based on whether these findings are constant, or nearly so, and refractory to therapy; are episodic, but present more than one-third of the time; or require continuous medication for control. One commenter felt that the use of the phrase "with or without" as used in diagnostic code 5025 is confusing and might be interpreted as rendering the symptoms that follow the phrase as superfluous and unnecessary in the evaluation of fibromyalgia.

Some individuals with fibromyalgia have only pain and tender points; others have pain and tender points plus stiffness; still others have pain and tender points plus stiffness and sleep disturbance; etc. As a shorter way of stating this, we have used the phrase "with or without,"

followed by a list of symptoms, to indicate that any or all of these symptoms may be part of fibromyalgia, but none of them is necessarily present in a particular case. When symptoms in addition to pain and tenderness are present, they may be used as part of the assessment of whether fibromyalgia symptoms are episodic or constant. When none of the symptoms on the list is present, the determination of whether the condition is episodic or constant must be based solely on musculoskeletal pain and tender points. The term "with or without" is also used in Sec. 4.116 (Schedule of ratings--gynecological conditions and disorders of the breast) of the rating schedule under diagnostic code 7619, "Ovary, removal of," where the criterion for a zero-percent evaluation is "removal of one with or without partial removal of the other." We believe that in both cases the phrase "with or without," rather than adding confusion, better defines the potential scope of the condition under evaluation. We therefore make no change based on this comment.

The same commenter questioned whether the intent is to place a ceiling of 40 percent on the evaluation of fibromyalgia despite the presence of one or more of the symptoms following the phrase "with or without."

As the evaluation criteria indicate, there may be multi-system complaints in fibromyalgia. If signs and symptoms due to fibromyalgia are present that are not sufficient to warrant the diagnosis of a separate condition, they are evaluated together with the musculoskeletal pain and tender points under the criteria in diagnostic code 5025 to determine the overall evaluation. The maximum schedular evaluation for fibromyalgia in such cases is 40 percent. If, however, a separate disability is diagnosed, e.g., dysthymic disorder, that is determined to be secondary to fibromyalgia, the secondary condition can be separately evaluated (see 38 CFR 3.310(a)), as long as the same signs and symptoms are not used to evaluate both the primary and the secondary condition (see 38 CFR 4.14 (Avoidance of pyramiding)). In such cases, fibromyalgia and its complications may warrant a combined evaluation greater than 40 percent. Since these rules are for general application, they need not be specifically referred to under diagnostic code 5025.

Another commenter referred to a statement in the supplementary information to the interim final rule that indicated that fibromyalgia is a benign disease that does not result in loss of

musculoskeletal function. The commenter said that while it is not a malignant disease which leads to anatomic crippling, the result of persistent chronic pain is often musculoskeletal dysfunction.

The statement regarding the lack of loss of musculoskeletal function is supported by medical texts which state, for example, that objective musculoskeletal function is not impaired in fibromyalgia ("The Manual of Rheumatology and Outpatient Orthopedic Disorders" 349 (Stephen Padgett, Paul Pellicci, John F. Beary, III, eds., 3rd ed. 1993)); that the syndrome is not accompanied by abnormalities that are visible, palpable, or measurable in any traditional sense; and that the patient must recognize the physical benignity of the problem ("Clinical Rheumatology" 315 (Gene V. Ball, M.D. and William J. Koopman, M.D., 1986)). These medical texts confirm that fibromyalgia does not result in objective musculoskeletal pathology. The criteria we have established to evaluate disability due to fibromyalgia are therefore based on the symptoms of[[Page 32411]]fibromyalgia rather than on objective loss of musculoskeletal function.

The same commenter said that more could have been said about the wide clinical spectrum of fibromyalgia and the associated stress response which may lead to clinical problems of psychopathology, inappropriate behavior, deconditioning, hormonal imbalance, and sleep disorder.

The evaluation criteria do include a broad spectrum of possible symptoms, and sleep disturbance is one of them. As discussed above, any disability, including a mental disorder, that is medically determined to be secondary to fibromyalgia, can be separately evaluated. The rating schedule is, however, a guide to the evaluation of disability for compensation, not treatment (see 38 CFR 4.1), and it is unnecessary for that purpose to include a broad discussion of the clinical aspects of fibromyalgia. We therefore make no change based on this comment.

The same commenter said that it is important to stress that fibromyalgia may co-exist with other rheumatic disorders and have an additive effect on disability. If two conditions affecting similar functions or anatomic areas are present, and one is service-connected and one is not (a situation that is not unique to rheumatic disorders), the effects of each are separately evaluated, if feasible.

When it is not possible to separate the effects of the conditions, VA **regulations** at 38 CFR 3.102, which require that reasonable doubt on any issue be resolved in the claimant's favor, dictate that the effects be attributed to the service-connected condition. Since there is an established method of evaluating co-existing conditions, there is no need to stress the point that other diseases may co-exist with fibromyalgia, resulting in additive effects, and we make no change based on this comment.

The commenter also stated that the correct diagnosis of fibromyalgia and the exclusion of other rheumatic conditions are of paramount importance in ensuring a successful treatment program.

The diagnosis of fibromyalgia and exclusion of other rheumatic disorders are functions of the examiner and outside the scope of the rating schedule, which, as noted earlier, is a guide for the evaluation of disability for purposes of compensation, not treatment. We therefore make no change based on this comment.

One commenter stated that claimants with fibromyalgia will present with limitation of motion of various joints of the body, and the rating agency will have to take into consideration pain on movement and functional loss due to pain (see 38 CFR 4.40 and 4.45). The commenter felt that the proposed scheme invites separate ratings for limitation of motion of each joint.

Fibromyalgia is a "nonarticular" rheumatic disease ("The Merck Manual" (1369, 16th ed. 1992)), and objective impairment of musculoskeletal function, including limitation of motion of the joints, is not present, in contrast to the usual findings in "articular" rheumatic diseases. Joint examinations in fibromyalgia are necessary only to exclude other rheumatic diseases because physical signs other than tender points at specific locations are lacking. The pain of fibromyalgia is not joint pain, but a deep aching, or sometimes burning pain, primarily in muscles, but sometimes in fascia, ligaments, areas of tendon insertions, and other areas of connective tissue (Ball and Koopman, 315). The evaluation criteria require that the pain be widespread, and that the symptoms be assessed based on whether they are constant or episodic, or require continuous medication, but they are not based on evaluations of individual joints or other specific parts of the musculoskeletal system. We believe the evaluation criteria make clear the basis of evaluation, and we therefore make no change based on this comment.

Based on the rationale set forth in the interim final rule document and this document, we are adopting the provisions of the interim final rule as a final rule without change. We also affirm the information in the interim final rule document concerning the Regulatory Flexibility Act.

List of Subjects in 38 CFR Part 4

Disability benefits, Individuals with disabilities, Pensions, Veterans.

Accordingly, the interim final rule amending 38 CFR part 4 which was published at 61 FR 20438 on May 7, 1996, is adopted as a final rule without change.

Approved: March 24, 1999.

**Togo D. West, Jr.,**

Secretary of Veterans Affairs.